

Summary: The court, finding the defendant guilty of four out of the ten offenses with which he was charged, continued the conditions of the defendant's release pending sentencing. The government subsequently filed a motion for detention. The court granted the motion, concluding that 18 U.S.C. § 3143(a)(2) mandated detention.

Case Name: USA v. David Joseph Jackson

Case Number: 1-06-cr-27

Docket Number: 59

Date Filed: 12/20/06

Nature of Suit:

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION**

United States of America,)	
)	
Plaintiff,)	ORDER FOR DETENTION
)	
vs.)	
)	Case No.: 1:06-cr-027
David Joseph Jackson,)	
)	
Defendant.)	

The government filed a motion for detention of the defendant pending sentencing on November 29, 2006. The defendant objected in a written response filed on November 30, 2006, and a hearing was held on December 8, 2006.

Before turning to the merits of the motion, some discussion of the circumstances in which the motion came before the court is warranted because of the somewhat unusual circumstances. Generally, the issue of release or detention pending sentencing is addressed in open court following the return of a guilty verdict by a jury, at least initially, with the issue sometimes then

being set for a further hearing or the court continuing existing bond arrangements subject to the parties filing motions seeking a change.

In this case, however, the determination of guilt came in the form of a written decision several days after the completion of the trial proceeding because the trial was to the court. At the end of his written decision, Judge Conmy continued the existing conditions of release. Although he did not explicitly state it, the obvious intention was that either party would then have the opportunity to motion the court for a change in release conditions since the parties had not yet been heard on the subject.

The defendant subsequently filed post-trial motions which were denied. The government then filed the present motion for detention, which Senior Judge Conmy referred to the undersigned for consideration.

The position of the government is that the defendant must be reduced to custody because 18 U.S.C. § 3143(a)(2) requires detention pending sentencing for any person found guilty of an offense that is described in § 3142(f)(1)(A)-(C). The position of the defendant is that the court has already decided the issue of detention in its decision on November 2, 2006, and is estopped by the tardiness of the government's request. The defendant also argues that "exceptional reasons" exist within the meaning of 18 U.S.C. § 3145(c) for the defendant's release pending sentencing. Finally, the defendant argues that nothing in 18 U.S.C. § 3143(a)(2) mandates the issuance of an arrest warrant and that the court may allow the defendant to report for detention.

The defendant cites no authority for his argument that the government has waived its right to seek detention. Congress's enactment of the statutory provisions of release and detention are for the benefit of the protection of the public. Consequently, even if there are circumstances in

which the government could waive its right to seek detention, the situation would have to be exceptional and that certainly is not the case here. This is the first opportunity that the government has had (or at least has taken) to present its position regarding detention pending sentencing. The fact that the government waited until after resolution of the post-trial motions is hardly indicative of a waiver, particularly since the ruling on those motions eliminated one of the points for consideration as to whether a defendant should be released pending sentencing, *i.e.*, a finding under 18 U.S.C. § 3143(a)(2)(A)(i) that there is a substantial likelihood that a motion for judgment of acquittal or new trial will be granted.¹

The statutory provisions that generally govern release or detention pending sentencing are found at 18 U.S.C. § 3143(a). In this case, the defendant was convicted of, among other offenses, the crime of Aggravated Sexual Abuse of a Child in violation of 18 U.S.C. § 2241(c). Since the maximum penalty for this offense is life imprisonment, it is an offense covered by 18 U.S.C. § 3142(f)(1)(A)-(C), specifically subsection (f)(1)(B). Consequently, the court must look to the provisions of subsection (2) of § 3143(a) in determining whether the defendant should be released or detained pending sentencing, at least initially.

As already noted, the provisions of subsection (A)(i) of § 3143(a)(2) are not a factor since the court has already denied the defendant's post-trial motions. This leaves the remaining provisions of § 3143(a)(2), which require detention unless the government is not recommending

¹ The fact that the government did not request at the conclusion of the trial proceeding that the defendant be remanded to custody immediately if the defendant was found guilty and waited until after resolution of the post-trial motions to file the present motion may reflect, at least to a degree, upon how seriously the government views the defendant as being either a flight risk or a danger to the community.

a sentence of imprisonment and it is determined by clear and convincing evidence that the defendant is not likely to flee or pose a danger to the community.

If the court need only consider § 3143(a)(2), detention is required because the government has indicated it will recommend a sentence of imprisonment in this case. In fact, the sentence of imprisonment is likely to be substantial given the applicable guideline ranges for this offense.

The defendant argues, however, he may be released pending sentence, notwithstanding the provisions of § 3143(a)(2), if he can prove “exceptional circumstances” within the meaning of 18 U.S.C. § 3145(c) and otherwise satisfy the criteria of that section. In this instance, the other criteria are the requirements in § 3143(a)(1) that the defendant prove by clear and convincing evidence that he is not a flight risk or a present danger to others or the community.

Whether a district court can consider the “exceptional circumstances” language of § 3145(c) in deciding the issue of detention pending sentencing or appeal has been the subject of some debate. See, e.g., United States v. Harrison, 430 F. Supp. 2d 1378, 1382-85 (M.D.Ga. 2006) (discussing cases). This court, however, has already ruled on the subject and has held that § 3145(c) applies. United States v. Vallie, 2001 WL 627432, *4 (D.N.D. 2001). Also, the Eighth Circuit has accepted an analysis that the “exceptional reasons” language applies in this situation without definitively deciding the issue in United States v. Mostrom, 11 F.3d 93 (8th Cir.1993).

Turning first to the risk of flight and danger to the community issues, the undersigned concludes that the defendant has shown by clear and convincing he is not a flight risk and that there are conditions the court can impose upon his release pending sentencing that make him not

a danger to other persons or the community. This evidence includes: the defendant's appearance for all judicial proceedings, including the trial and the hearing on the subject motion; the defendant's limited financial and other resources that make flight improbable; the defendant's ties to the community; the lack of any evidence that the defendant violated any of the conditions of pretrial release and the affirmative evidence indicating he has faithfully complied with the conditions of release; the defendant's lack of any other prior criminal record; the fact that there are no children presently residing on the premises where the defendant is living; and the conditions of the existing release that prohibit his having contact with children, that provide for the monitoring of these conditions by a responsible third party, and the defendant's confinement to his residence, except when accompanied by an adult, and other travel restrictions.

The court concludes the defendant has not, however, proven the existence of "exceptional reasons" within the meaning of § 3145(c). The primary reason asserted by the defendant is that there are other family members in the defendant's household who are suffering from various ailments or disabilities that require his assistance. However, it is not a question of whether or not the defendant's ability to provide that assistance will end, it is just a question of when, and this type of hardship and "collateral damage" to the defendant's family is a normal incident of a sentence of imprisonment. Further, the evidence presented at the hearing was that there are others within the defendant's extended family who also could provide the assistance, although possibly not as easily as the defendant. Under these circumstances, family hardships do not constitute "exceptional reasons." See, e.g., United States v. Schlesinger, 2005 W.L. 167043, *3-4 (E.D.N.Y. 2005); United States v. Vallie, 2001 WL 627432, *5; United States v. Burnett, 76 F. Supp. 2d 846, 849-850 (E.D.Tenn. 1999).

Another reason relied upon by the defendant is that his openly gay lifestyle and manner of appearance put him at risk in incarceration. In fact, when the defendant appeared in court for the hearing, he had his hair pulled back and his fingernails were painted, among other things. Simply being gay, however, does not excuse a person from having to serve a prison sentence. Further, no evidence was presented that the Burleigh County Detention Center, or any of the other local facilities where the defendant is likely to held by the Marshal's Service until sentencing, would be unable to protect the defendant until he is transferred to his ultimate place of confinement. In fact, the defendant was incarcerated for a short period of time following his arrest until he was released on pretrial release subject to conditions by Magistrate Judge Senechal and no evidence was presented that he had any particular problems during this time period. Consequently, the fact that the defendant is gay is not an "exceptional reason."

Still another reason offered by the defendant is a need to put his affairs in order. This also is not "exceptional reasons." See id. Further, at the hearing on this matter when the undersigned did not immediately remand the defendant to custody, the defendant was warned that he should get his affairs in order immediately upon returning home from the hearing. Finally, not only are the reasons proffered not sufficient to constitute "exceptional reasons" when considered individually, they are also not sufficient when considered collectively or in combination with other factors such as the defendant's performance while on pretrial release.

The final issue to consider is whether an immediate arrest warrant should be issued or whether the defendant should be allowed to report for detention. As to this issue, the court has some discretion. Given the conclusions that the defendant is not a flight risk or presently a danger to the safety of the community (which also were the implicit conclusions of Senior Judge

Conmy upon completion of the trial and Magistrate Judge Senechal during pretrial) and the unique circumstances of this case, the court believes allowing the defendant to report for detention is appropriate. Based on the foregoing, the court **GRANTS** the government's Motion for Detention Pending Sentencing (Docket No. 53) and **ORDERS** the defendant to report to the Burleigh County Detention Center in Bismarck on or before 1:00 p.m., January 2, 2007, for detention pending sentencing or further order of the court by the United States Marshal's Service. This will also give the defendant some opportunity to appeal the decision of the undersigned pursuant to Local Rule 72.1(E)(3) and seek a stay pending appeal, which, given the circumstances, need not be sought first from the undersigned.

Dated this 20th day of December, 2006.

/s/ Charles S. Miller, Jr.

Charles S. Miller, Jr.
United States Magistrate Judge